

Office-Supreme Court, U.S.
FILED

MAY 31 1983

ALEXANDER L. STEVAS,
CLERK

No. 82-1792

IN THE
**Supreme Court of the
United States**

OCTOBER TERM, 1982

DALLAS COUNTY, TEXAS,
Petitioner,

v.

CARL THOMAS, ET AL.,
Respondents,

v.

DONALD WILLIAMS,
Respondent.

**RESPONDENT DONALD WILLIAMS' BRIEF
IN OPPOSITION TO PETITION
FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

ROBERT T. MOWREY
LOCKE, PURNELL, BOREN, LANEY & NEELY
(A Professional Corporation)
3600 RepublicBank Tower
Dallas, Texas 75201-3989
(214) 746-7400

Attorneys for Respondent
DONALD WILLIAMS

TABLE OF CONTENTS

	<i>Page</i>
Table of Contents	i
Table of Authorities	ii
Statement of the Case	1
A. Course of Proceedings and Disposition in Courts Below	1
1. The Pleadings	1
2. The Jury Verdict and Judgment	3
3. The Opinion of the Fifth Circuit Court of Appeals	5
B. Statement of Facts	5
Summary of Argument	5
Argument	
A. This Court Should Not Grant a Writ of Certiorari Because the United States Court of Appeals for the Fifth Circuit was Correct in its Holding that Respondent Donald Williams was a Pre- vailing Party under 42 U.S.C. § 1988 ...	6
B. This Court Should Not Grant a Writ of Certiorari Because the United States Court of Appeals for the Fifth Circuit was Correct in its Holding that Dallas County Should be Liable for Payment of Attorney Fees	15
Conclusion	20
Certificate of Service	20

TABLE OF AUTHORITIES

<i>Cases</i>	<i>Page</i>
Bond v. Stanton, 555 F.2d 172 (7th Cir. 1977), cert. denied, 438 U.S. 916 (1978)	12
Collins v. Thomas, 649 F.2d 1203 (5th Cir. 1981), cert. denied, ____ U.S. ____, 102 S.Ct. 1992 (1982)	18
Ellwest Stereo Theatre, Inc. v. Jackson, 653 F.2d 954 (5th Cir. 1981)	8
Ex Parte Young, 209 U.S. 123 (1908)	18
Fitzpatrick v. Bitzer, 427 U.S. 445 (1976)	19
Gates v. Collier, 616 F.2d 1268 (5th Cir. 1980)	7,11
Gibbs v. Town of Frisco City, 626 F.2d 1218 (5th Cir. 1980)	8
Hagans v. Lavine, 415 U.S. 528 (1974)	10
Hanrahan v. Hampton, 446 U.S. 754 (1980)	13
Harlow v. Fitzgerald, ____ U.S. ____, 102 S.Ct. 2727 (1982)	14
Hutto v. Finney, 437 U.S. 678 (1978)	6,15,16,20
Kimbrough v. Arkansas Activities Association, 574 F.2d 423 (8th Cir. 1978)	12
Knighton v. Watkins, 616 F.2d 795 (5th Cir. 1980)	17,20
Lund v. Affleck, 587 F.2d 75 (1st Cir. 1978)	11
Maher v. Gagne, 448 U.S. 122 (1980)	5,7,8
Maine v. Thiboutot, 448 U.S. 1 (1980)	6,7
Miller v. Carson, 563 F.2d 741 (5th Cir. 1977)	18
Milwe v. Cavuoto, 653 F.2d 80 (2d Cir. 1981)	10
Morales v. Haines, 486 F.2d 880 (7th Cir. 1973) ..	9
New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980)	8
Newman v. Piggie Park Enterprises, Inc., 390 U.S. 48 (1968)	8
Riddell v. National Democratic Party, 624 F.2d 539 (5th Cir. 1980)	8

	<i>Page</i>
Seals v. Quarterly County Court, 562 F.2d 390 (6th Cir. 1977)	11,18
United Mine Workers v. Gibbs, 383 U.S. 715 (1966)	10
Universal Amusement Co. v. Hofheinz, 616 F.2d 202 (5th Cir. 1980)	18
White v. New Hampshire Department of Employment Security, 455 U.S. 445 (1982)	7,19
Wood v. Strickland, 420 U.S. 308 (1975)	14

Statutes

Tex. Rev. Civ. Stat. Ann. art. 332c § 2 (Vernon Supp. 1982)	2,15
42 U.S.C. § 1981, Equal rights under the law (1981)	6
42 U.S.C. § 1982, Property rights of citizens (1981)	6
42 U.S.C. § 1983, Civil action for deprivation of rights (1981)	2
42 U.S.C. § 1985, Conspiracy to interfere with civil rights (1981)	6
42 U.S.C. § 1986, Action for neglect to prevent (1981)	6
42 U.S.C. § 1988, Civil Rights Attorney's Fees Awards Act of 1976 (1981)	5

Miscellaneous

H.R. Rep. No. 94-1558 (1976)	10
S. Rep. No. 94-1011 (1976)	17

No. 82-1792

IN THE
**Supreme Court of the
United States**
OCTOBER TERM, 1982

DALLAS COUNTY, TEXAS,
Petitioner,

v.

CARL THOMAS, ET AL.,
Respondents,

v.

DONALD WILLIAMS,
Respondent.

**RESPONDENT DONALD WILLIAMS' BRIEF
IN OPPOSITION TO PETITION
FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

STATEMENT OF THE CASE

**A. Course of Proceedings and Disposition in
Courts Below**

1. The Pleadings

Respondent Donald Williams ("Williams") instituted this suit *pro se* against Dallas County Sheriff Carl

Thomas ("Thomas"), Lieutenant George Williams, and Deputy Sheriffs Joseph E. Bolt, Sr. ("Bolt"), and Larry Smith ("Smith") seeking relief under the Civil Rights Act, 42 U.S.C. § 1983. Williams alleged that he "was grab [sic] by Officer Boat [sic] and slam [sic] to the wall and then to the floor."

On August 29, 1979, counsel was appointed to represent Williams. Prior to trial, Williams filed an amended complaint alleging that Deputy Bolt's actions constituted excessive force in violation of Williams' constitutional rights and constituted an assault and battery under state law.

Respondent Bolt and the other original defendants were represented by the Dallas County District Attorney's office pursuant to Tex. Rev. Civ. Stat. Ann. art. 332c § 2 (Vernon Supp. 1982) which provides:

In any suit instituted by a nonpolitical entity against an official or employee of a county, the district attorney of the district in which the county is situated or the county attorney, or both, shall, subject to the provisions contained in Section 3, represent the official or employee of the county *if the suit involves any act of the official or employee while in the performance of public duties.*

Fifth Circuit opinion, Petitioner's Appendix A-17 (emphasis added).

Thomas denied that he directed, approved, ratified, affirmed, or had any knowledge of any unlawful

¹ Amazingly, Petitioner Dallas County, Texas argues that because Defendant-Respondent Bolt's name was misspelled in Williams' *pro se* complaint, Bolt "was not named in the Original Complaint [and thus] there was no claim by Plaintiff that he was sued in his official capacity." [Petition for a Writ of Certiorari 5.]

act by any person against Williams. Officers George Williams, Bolt, and Smith denied that they slammed Williams against the wall or floor or that they kicked or beat him and contended that only the minimum force necessary, if any, was used in dealing with Williams.

In the Pretrial Order, the parties stipulated that "[a]t all relevant times, Thomas, George Williams, Bolt, and Smith were acting under color of state law." Moreover, the parties stipulated that "Bolt was a Deputy Sheriff for the Dallas County Sheriff's Office on [the date of the altercation between Williams and Bolt.]"

2. The Jury Verdict and Judgment

Following a jury trial, and after the trial court dismissed the action as to Thomas, the jury found as follows:

Section 1983 Claim

1. (a) Bolt used excessive force against Williams.
(b) Smith did not use excessive force against Williams.
2. Bolt acted in reasonable good faith.
3. Bolt's use of unreasonable force was a proximate cause of Williams' injuries.
4. Williams was entitled to no monetary compensation for Bolt's use of unreasonable force against him.
5. In using unreasonable force Bolt acted without malice.
6. Based on its finding that Bolt acted without malice,

the jury was not required to make a finding as to punitive damages.

Assault and Battery Claim

7. (a) Bolt committed an assault and battery against Williams, and such assault and battery was a proximate cause of Williams' injuries, though inflicted without malice.

(b) Smith did not commit assault and battery against Williams.
8. In committing an assault and battery against Williams, Bolt was not acting in self-defense.
9. Williams was entitled to Five Hundred Dollars (\$500) as compensation for Bolt's assault and battery against him.
10. Based on its finding that Bolt acted without malice, the jury was not required to make a finding as to punitive damages.

District court opinion and jury charge, Petitioner's Appendix B-8; D-10-15.

Based upon this jury verdict and after a hearing on attorney fees, the trial court entered judgment against Bolt awarding Williams \$500 in damages and \$2,500 in attorney fees, both with interest at the legal rate, and costs. (District court judgment, Petitioner's Appendix B-1.)

Bolt appealed from the trial court's judgment and Williams perfected a cross-appeal from the amount of attorney fees awarded by the trial court.

3. The Opinion of the Fifth Circuit Court of Appeals

The United States Court of Appeals for the Fifth Circuit affirmed the district court's award of \$500.00 in compensatory damages, reversed the district court's inadequate award of attorney fees and remanded the case for a determination of the proper amount of attorney fees due, holding that the attorney fee award lies against Dallas County, the employer of Respondent Bolt. (Fifth Circuit opinion, Petitioner's Appendix A-20.)

B. Statement of Facts

Williams was an inmate in an all-black cell in the Dallas County jail on February 21, 1979.² During an incident concerning another inmate, Officer Bolt grabbed Williams and slammed him against the wall and floor. As a result of Officer Bolt's actions, Williams received injuries which required examination by a nurse and later a doctor who referred Williams to Parkland Hospital for further examination. The Dallas County Jail Medical Records indicate that Williams sustained bruises on his left side, left arm, and wrist.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Fifth Circuit was correct in its holding that Respondent Donald Williams was a prevailing party under Section 1988 of Title 42 of the United States Code ("§ 1988") in that there were no special circumstances which would render such a fee award unjust. Further, Williams prevailed on his state pendent claim of assault and battery and this Court has

² See the more complete factual background as set forth by the Fifth Circuit Court of Appeals. (Petitioner's Appendix A-5-6.)

held that a plaintiff's success on a pendent state claim entitles him to attorney fees under § 1988. See *Maher v. Gagne*, 448 U.S. 122 (1980). Moreover, Respondent Williams prevailed on his constitutional claim in that the jury found that Respondent Bolt used excessive force against Williams.

Secondly, the United States Court of Appeals for the Fifth Circuit was correct in its holding that Dallas County should be liable for payment of attorney fees because this Court has clearly established that an attorney fee award may lie against the public employer of Respondent Bolt even though Petitioner Dallas County, Texas was not named as a party in the litigation. See *Hutto v. Finney*, 437 U.S. 678 (1978).

ARGUMENT

A. THIS COURT SHOULD NOT GRANT A WRIT OF CERTIORARI BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT WAS CORRECT IN ITS HOLDING THAT RESPONDENT DONALD WILLIAMS WAS A PREVAILING PARTY UNDER 42 U.S.C. § 1988

1. Williams was Entitled to Attorney Fees as a "Prevailing Party"

The Civil Rights Attorney's Fees Awards Act of 1976, codified in § 1988, provides, in relevant part:

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

In *Maine v. Thiboutot*, 448 U.S. 1, 9 (1980), this Court emphasized that § 1988 “states that fees are available in any § 1983 action” (original emphasis) and further remarked:

The legislative history is entirely consistent with the plain language. As was true with § 1983, a major purpose of the Civil Rights Attorney’s Fees Awards Act was to benefit those claiming deprivations of constitutional and civil rights. Principal sponsors of the measure in both the House and the Senate, however, explicitly stated during the floor debates that the statute would make fees available more broadly.

448 U.S. at 9.

It has been recognized that the courts “have taken an extremely liberal view on nearly every interpretive question that has arisen thus far under § 1988.” *Gates v. Collier*, 616 F.2d 1268, 1275 (5th Cir. 1980). See, e.g., *White v. New Hampshire Department of Employment Security*, 455 U.S. 445 (1982) (Court held that request for an attorney fee award under § 1988 was not a “motion to alter or amend the judgment” subject to ten-day statutory standard); *Maher v. Gagne*, 448 U.S. 122 (1980) (Under § 1988 the district courts’ authority to award attorney fees is not limited to cases in which § 1983 is invoked as a remedy for a constitutional violation or a violation of a federal statute providing for the protection of civil or equal rights; fact that respondent prevailed through a settlement rather than through litigation does not preclude respondent from claiming attorney fees as the “prevailing party” within the meaning of § 1988; district court is not barred by the Eleventh Amendment from awarding attorney fees against a state); *Maine v. Thiboutot*, 448 U.S. 1 (1980) (§ 1988 permits an attorney fee award in statu-

tory § 1983 actions; § 1988 attorney fee awards are proper in either federal or state court).

It is well settled that § 1988 requires the court to award fees to the prevailing party "unless special circumstances would render such an award unjust." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). See also *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 68 (1980).

Such "special circumstances" are not to be found in the case at bar. In *Gibbs v. Town of Frisco City*, 626 F.2d 1218, 1221 n. 4 (5th Cir. 1980), the Court of Appeals for the Fifth Circuit stated:

[S]olely by its nature, a classical police brutality case does not present the strong showing of special circumstances that justifies denial of a fee award.

Moreover, the jury finding that Officer Bolt acted in good faith is not a special circumstance to prevent an award of attorney fees. See, e.g., *Ellwest Stereo Theatre, Inc. v. Jackson*, 653 F.2d 954, 955 (5th Cir. 1981) ("The good faith of government defendants acting in their official capacity is not a relevant factor for the district court to consider when determining whether special circumstances exist"); *Riddell v. National Democratic Party*, 624 F.2d 539, 545 (5th Cir. 1980) ("State officials cannot show special circumstances sufficient to prevent an award of fees merely because the officials enforced the statute in good faith compliance with their official duty").

2. Williams is a "Prevailing Party" Because He Prevailed on His State Pendent Claim of Assault and Battery

Williams clearly prevailed on the state pendent claim of assault and battery. This Court has held that a plaintiff's

success on a pendent state claim entitles him to attorney fees under § 1988.

In *Maher v. Gagne*, 448 U.S. 122 (1980), this Court considered the question whether attorney fees may be assessed against state officials after a case has been settled by the entry of a consent decree, without any determination that the plaintiffs constitutional rights have been violated. In holding that attorney fees are proper under such circumstances, this Court stated:

And clearly Congress was not limited to awarding fees only when a constitutional or civil rights claim is actually decided. We agree with the courts below that Congress was acting within its enforcement power in allowing the award of fees in a case in which the plaintiff prevails on a wholly statutory, non-civil-rights claim pendent to a substantial constitutional claim or in one in which both a statutory and a substantial constitutional claim are settled favorably to the plaintiff without adjudication.

448 U.S. at 132.

Additionally, this Court observed:

The legislative history makes it clear that Congress intended fees to be awarded where a pendent constitutional claim is involved, even if the statutory claim on which the plaintiff prevailed is one for which fees cannot be awarded under the Act. The Report of the Committee on the Judiciary of the House of Representatives accompanying H.R. 15460, a bill substantially identical to the Senate bill that was finally enacted, stated:

"To the extent a plaintiff joins a claim under one of the statutes enumerated in H.R. 15460 with a claim that does not allow attorney fees, that plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claim for the purpose of awarding counsel fees. *Morales v. Haines*, 486 F.2d 880 (7th Cir. 1973). In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive. *Hagans v. Lavine*, 415 U.S. 528 (1974). In such cases, if the claim for which fees may be awarded meets the 'substantiality' test, see *Hagans v. Lavine*, *supra*; *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a 'common nucleus of operative fact.' *United Mine Workers v. Gibbs*, *supra*, at 725." H.R. Rep. No. 94-1558, p. 4, n. 7 (1976).

448 U.S. at 132-33 n.15.³

³ Petitioner Dallas County quotes the statement in *Maier v. Gagne*, 448 U.S. 122 (1980), that "there is no need to reach the question whether a federal court could award attorney's fees against a state based on a statutory, non-civil-rights claim." (Petition for a Writ of Certiorari 14.) Petitioner, however, fails to quote the portion of this Court's opinion directly following the portion quoted above which states that the *Maier* petitioner *alleged* violations of due process and equal protection and that these allegations were "sufficiently substantial to support federal jurisdiction." 448 U.S. at 131. In the case at bar, not only did Respondent Williams allege constitutional violations, the jury found constitutional violations by its finding of Bolt's use of excessive force.

The facts of *Milwe v. Cavuoto*, 653 F.2d 80 (2d Cir. 1981), are strikingly similar to those of the case at bar. In *Milwe*, a jury found the law enforcement officer had used excessive force in violation of the plaintiff's constitutional rights and that the defendant also had committed the pendent state tort claim of assault. The jury ordered compensatory damages of one dollar (\$1.00) on the federal claim and One Thousand Three Hundred Twenty dollars (\$1,320.00) on the state claim. The trial court denied the plaintiff's motion for attorney fees. Reversing the trial court and rejecting the defendant's argument that an attorney fee award was inappropriate "since the jury ordered substantial damages only on the pendent state assault claim and not on the constitutional violation," the court followed this Court's *Maher* decision and held that the trial court had abused its discretion in failing to assess attorney fees against the government defendant.

Numerous other circuit courts have held that a plaintiff's success on a pendent state claim entitles him to attorney fees under § 1988. See, e.g., *Gates v. Collier*, 616 F.2d 1268, 1275 (5th Cir. 1980) ("the Courts have held that when a party files a case under a federal statute covered by § 1988 and also files a pendent state claim which is dispositive, the [Fee Awards] Act nonetheless entitles the prevailing party to attorneys' fees"); *Lund v. Affleck*, 587 F.2d 75, 76-77 (1st Cir. 1978) (Although "plaintiffs did not prevail under the federal Civil Rights Act but upon a pendent nonconstitutional statutory claim" the attorney fee award was proper in that "the § 1983 claim was substantial and . . . the successful pendent claim arose from the same nucleus of facts"); *Seals v. Quarterly County Court*, 562 F.2d 390, 393-94 (6th Cir. 1977) (Plaintiff prevailed on a state claim based on the same operative facts as the federal claim on which plaintiffs did not prevail, and court stated that "Congress

clearly has the power in such a circumstance to authorize attorney's fees as a matter of federal law, and it equally clearly has done so"); *Bond v. Stanton*, 555 F.2d 172, 174 (7th Cir. 1977), *cert. denied*, 438 U.S. 916 (1978); *Kimbrough v. Arkansas Activities Association*, 574 F.2d 423, 426 (8th Cir. 1978) (Quoting a report of the House Judiciary Committee, the court stated: "To the extent a plaintiff joins a claim under one of the statutes enumerated in [the Act] with a claim that does not allow attorney fees, that plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claim for the purpose of awarding counsel fees.'").

Although Petitioner Dallas County asserts that Respondent Williams recovered "nothing" on his § 1983 claim, the Fifth Circuit disagreed:

[A]lthough Williams' monetary recovery was relatively small, it is clear that the attorneys succeeded in vindicating Williams' established constitutional rights. The jury's response to Special Issue 1 clearly indicates that Williams' constitutional protections were infringed. Additionally, it is difficult to place a monetary amount upon the benefit that the public receives when public officials are reminded that acts of unwarranted violence will not go unnoticed in the American system of justice. . . . As perceived correctly, Williams' counsel not only prevailed in the instant case, but succeeded in vindicating the established, important constitutional rights guaranteed to all citizens. Such a result furthers the policies behind section 1983 and provides incentive for other victims of improper governmental conduct to seek redress pursuant to constitutional authority. The policies behind section 1988 are compromised when a district court places un-

due emphasis upon the amount of the monetary recovery in arriving at its attorney's fees award.

Fifth Circuit opinion, Petitioner's Appendix A-14.⁴

Thus, under settled law, Williams clearly is entitled to recovery of attorney fees pursuant to § 1988 because not only were his important constitutional rights vindicated but also because he recovered damages under the pendent state claim of assault and battery. The substantial nature of the federal claim is demonstrated by the jury's finding that Officer Bolt used excessive force against Williams. Moreover, it cannot be questioned that the assault and battery and excessive force claims arose out of a "common nucleus of operative fact."

3. Williams is a "Prevailing Party" Because the Jury Found that Bolt Used Excessive Force

On Respondent Williams' § 1983 claim the jury found that Officer Bolt used excessive force against Williams; that is, he used force greater than was reasonably necessary to prevent injury or maintain discipline, and the force used was greater than that which a detention officer of ordinary prudence would have used. (Jury charge, Petitioner's Appendix D-6-7, 10). Additionally, the jury found that Officer Bolt acted in good faith and that Respondent

⁴ Petitioner cites *Hanrahan v. Hampton*, 446 U.S. 754 (1980), for the proposition that "one is not a prevailing party if he fails to recover on the merits of his claim." (Petition for a Writ of Certiorari 14). In *Hanrahan*, this Court held that respondents were not "prevailing" parties because they had not prevailed on the merits of any of their claims and the court of appeals had held only that the respondents were entitled to a trial of their cause. Significantly, this Court in *Hanrahan*, noting congressional history that "Parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief" (H.R. Rep. No. 94-1558, p. 7 (1976)), observed "that Congress intended to permit the interim award of counsel fees only when a party has prevailed on the merits of *at least some of his claims*." 446 U.S. at 758 (emphasis added).

Williams was not entitled to any monetary compensation for Officer Bolt's use of unreasonable force against him.

The trial court admitted it erred in submitting a charge to the jury in regard to the good faith defense under § 1983. (District court opinion, Petitioner's Appendix B-14). In *Wood v. Strickland*, 420 U.S. 308, 322 (1975), this Court held that an official is liable under § 1983 "if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights" of the person affected. This Court in *Wood* went on to hold that an official will not be shielded from liability if he acts "with such disregard of the [plaintiffs] clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith." 420 U.S. at 322. See also *Harlow v. Fitzgerald*, _____ U.S. _____, 102 S.Ct. 2727, 2738 (1982) ("We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known").

Thus, the trial court was correct in concluding "that the use of excessive force against prisoners necessarily involves the violation of well-established constitutional norms regarding the treatment of prisoners." (District court opinion, Petitioner's Appendix B-19). Deputy Bolt's behavior in grabbing Williams, slamming him against a wall, and throwing him to the floor where he kicked and beat him clearly violated Williams' "constitutional right to be free from such unjustified assaults." *Id.* Thus, "[a]s a matter of law no 'good faith' defense was applicable in this action." *Id.*

B. THIS COURT SHOULD NOT GRANT A WRIT OF CERTIORARI BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT WAS CORRECT IN ITS HOLDING THAT DALLAS COUNTY SHOULD BE LIABLE FOR PAYMENT OF ATTORNEY FEES

It is clearly established that an attorney fee award may lie against the public employer of Officer Bolt even if it is not named as a party in the litigation. *See Hutto v. Finney*, 437 U.S. 678, 694 (1978).

Petitioner Dallas County asserts that Respondent Williams sought no relief against Dallas County nor did he seek relief against Officer Bolt in his official capacity. The Pre-Trial Order to which Petitioner Dallas County refers states as a stipulated fact that “[a]t all relevant times, . . . Bolt [was] acting under color of State law.” Moreover, the Pre-Trial Order states as a stipulated fact that Officer Bolt was a Deputy Sheriff for the Dallas County Sheriff’s Office on the date of the altercation between Officer Bolt and Respondent Williams.

Although Dallas County was not named as a party, the Fifth Circuit noted that Deputy Bolt was represented by the Dallas County District Attorney’s Office pursuant to Tex. Rev. Civ. Stat. Ann. art. 332c § 2 (Vernon Supp. 1982) (emphasis added) which provides:

In any suit instituted by a nonpolitical entity against an official or employee of a county, the district attorney of the district in which the county is situated or the county attorney or both, shall, subject to the provisions contained in Section 3, represent the official or employee of the county *if the suit involves any act of the official or employee while in the performance of public duties.*

As stated by this Court in *Hutto v. Finney*, 437 U.S. 678, 699 and n. 32 (1978):

The Attorney General is hardly in a position to argue that the fee awards should be borne not by the State, but by individual officers who have relied on his office to protect their interest throughout the litigation.

* * * *

Although the Eleventh Amendment prevented Respondents from suing the State by name, their injunctive suit against prison officials, was, for all practical purposes, brought against the State. The actions of the Attorney General himself show that his office has defended this action since it began.

Here, similarly to *Hutto*, Petitioner Dallas County, through the District Attorney's Office, represented Officer Bolt throughout this litigation. Now, Petitioner seeks to have its employee bear the burden of an attorney fee award.⁵

In *Hutto*, this Court held that the Eleventh Amendment does not prevent an award of attorney fees against state prison officials acting in their official capacity. This Court observed:

The legislative history is equally plain: '[I]t is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or

⁵ Respondent Williams' argument that the fee award should lie against Dallas County is no surprise to Petitioner; Williams had argued vigorously in the trial court that Dallas County should bear the attorney fee award.

local government (whether or not the agency or government is a named party).’ S. Rep. No. 94-1011, p. 5 (1976) (footnotes omitted). The House Report is in accord: ‘The greater resources available to governments provide an ample base from which fees can be awarded to the prevailing plaintiff in suits against governmental officials or entities.’ H. R. Rep. No. 94-1558, p. 7 (1976). . . . Congress’ intent was expressed in deeds as well as words. It rejected at least two attempts to amend the Act and immunize state and local governments from awards.

437 U.S. at 694 (note omitted). See *Knighton v. Watkins*, 616 F.2d 795, 799-800 (5th Cir. 1980) (“Congress intended defendant state governmental bodies, rather than prevailing parties, to bear the burden of civil rights litigation, even when budgets are small”).

Petitioner Dallas County is incorrect in its assertion that the Court of Appeals for the Fifth Circuit relied only upon Williams’ original *pro se* complaint that Bolt was sued in his official capacity. Indeed, the Fifth Circuit looked to the substance of the matter and not to whether the magic words “in his official capacity” were employed in the style of the case. The Fifth Circuit stated:

[I]t is clear that Deputy Bolt was on duty and responding to the orders of his superior, Officer Riggins, when he encountered Williams. This is not a case in which the tort did not arise out of the government employee’s performance of his duties. Although Deputy Bolt arguably may have exceeded his authority by using excessive force, it has long been settled that he was still acting in an official capacity. See *Ex Parte Young*, 209 U.S. 123 (1908).

Fifth Circuit opinion, Petitioner’s Appendix A-18.

Although Officer Bolt went beyond his duties by using excessive force, he clearly was acting within his official capacity at the time of the assault on Williams. Officer Bolt, a jail detentions officer and a deputy sheriff, was called for assistance while on duty at the jail to aid in handling a situation involving inmate discipline in a jail cell. Thus, Officer Bolt was necessarily acting in his official capacity when he encountered Williams at the jail cell.

The frequently cited legislative history quoted above indicates that attorney fees may be collected "from the State or local government." See *Hutto*, *supra*, 437 U.S. at 694 (emphasis added). Courts have confirmed the implications in *Hutto* that attorney fees may be awarded against governmental entities other than the state. *Gates v. Collier*, 616 F.2d 1268, 1276 (5th Cir. 1980) ("Fees are recoverable against government officials acting in their official capacity") (emphasis added). In *Universal Amusement Co. v. Hofheinz*, 616 F.2d 202, 204 (5th Cir. 1980), the court remarked:

[I]t would follow from the legislative history quoted above and the implications of *Hutto*, that local governments would not be immune either. *Miller v. Carson*, 563 F.2d 741, 755-56 (5th Cir. 1977).

See also *Collins v. Thomas*, 649 F.2d 1203, 1205 (5th Cir. 1981), *cert. denied*, — U.S. —, 102 S.Ct. 1992 (1982) ("The § 1988 award against Thomas in his official capacity lies against the Dallas County treasury even though Dallas County was not named as a party in the plaintiffs' suit"); *Seals v. Quarterly County Court*, 562 F.2d 390, 394 (6th Cir. 1977) ("Defendants' argument that the Eleventh Amendment bars an award of attorney fees against the county has, of course, been disposed of by the

Supreme Court in *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976)").

The fact that the District Attorney's office of Dallas County has represented Officer Bolt throughout the course of the proceeding indicates that Petitioner Dallas County ultimately is the responsible party to bear the costs, including attorney fees incurred by Respondent Williams in this case.

Petitioner Dallas County cites various cases in support of its contention "that there is no *respondeat superior* liability under Section 1983 claims." (Petition for a Writ of Certiorari 20.) Thus, Petitioner Dallas County asserts that it is not liable for attorney fees because there "was no county custom or policy authorizing, permitting or ratifying Bolt's acts"; that "Sheriff Thomas did not participate in, authorize or ratify Bolt's acts"; and that "Bolt was not an official whose acts and edicts may fairly be said to represent County policy". *Id.* at 21.

The *respondeat superior* cases cited by Petitioner are not applicable to the case at bar in that those cases concern damage awards and not an award of attorney fees. As this Court made clear in *Hutto*, "attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party)." 437 U.S. at 694.

In *White v. New Hampshire Department of Employment Security*, 455 U.S. 445, 102 S.Ct. 1162 (1982), this Court stated:

Unlike other judicial relief, the attorney's fees allowed under § 1988 are not compensation for the injury giving rise to an action. Their award

is uniquely separable from the cause of action to be proved at trial. See *Hutto v. Finney*, 437 U.S. 678, 695 n.24 (1978).

As the Court of Appeals for the Fifth Circuit recently stated:

"[A] motion for attorney's fees is unlike a motion to alter or amend a judgment. It does not imply a change in the judgment, but merely seeks what is due because of the judgment. It is, therefore, not governed by the provisions of Rule 59(e)."

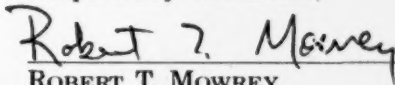
Knighton v. Watkins, 616 F.2d 795, 797 (CA 5 1980).

455 U.S. at ____; 102 S.Ct. at 1166-67 (note omitted).

CONCLUSION

For the foregoing reasons, Respondent Donald Williams prays that this Honorable Court deny Petitioner Dallas County, Texas' Petition for a Writ of Certiorari.

Respectfully submitted,



ROBERT T. MOWREY

LOCKE, PURNELL, BOREN, LANEY & NEELY
(A Professional Corporation)

3600 RepublicBank Tower
Dallas, Texas 75201-3989
(214) 746-7400

Attorneys for Respondent
DONALD WILLIAMS

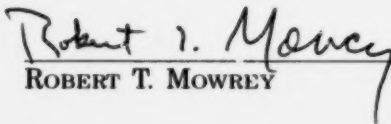
PROOF OF SERVICE

THE STATE OF TEXAS }
COUNTY OF DALLAS }

Before me the undersigned Notary Public in and for Dallas County, Texas, on this day personally appeared Robert T. Mowrey, who being by me duly sworn, upon oath stated: I, Robert T. Mowrey, am the attorney of record for Respondent Donald Williams and have made application to the Bar of the Supreme Court of the United States. I state upon oath that upon the 27th day of May, 1983, I served copies of the foregoing Respondent Donald Williams' Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit by depositing the same in the United States Mail, with first class postage prepaid, addressed to the following counsel of record in the courts below at the addresses indicated, to wit:

Ms. Sue Lagarde, Assistant District Attorney
Ninth Floor
Dallas County Courthouse
Dallas, Texas 75202

Mr. Earl Luna
Law Offices of Earl Luna, P.C.
2416 LTV Tower
1525 Elm Street
Dallas, Texas 75201


ROBERT T. MOWREY

SUBSCRIBED and SWORN TO before me by the said
Robert T. Mowrey, this the 27th day of May, 1983.

Rita Lambert

Notary Public in and for the State of Texas

My Commission
Expires:

7-22-84

RITA LAMBERT

Print Name of Notary